Supreme Court, U.S.
FILED

No. 93-435

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,
PETITIONER

v.

ANNA RUE CAMP AND JOHN E. VENN,
as Trustee of the Estate of
Fariss D. Kimbell, Jr., M.D.,
RESPONDENTS

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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1. Respondents argue at Br. in Opp. 4 & 5 that the Court should deny Petitioner's Petition because of the interlocutory nature of the Eleventh Circuit's order. Respondents are in error in asserting that the Eleventh Circuit's ruling is interlocutory. The Eleventh Circuit's ruling is a final order which reviewed a final judgment of the District Court granting Petitioner's Motion for Summary Judgment.

This Court generally refrains from issuing writs of certiorari to review decrees of circuit courts of appeal where the matter before the circuit court is "on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville Railway*, 148 U.S. 372, 384 (1893). The order of the

District Court granting summary judgment to Petitioner was clearly not an interlocutory order.

Further, there are no factual matters which might be resolved at trial which would impact the questions presented by the Petition. The Petition presents questions which are pure matters of law, based upon undisputed facts. It would be inappropriate, in fact, for Petitioner to relitigate in the District Court (and presumably in the Eleventh Circuit, on appeal from any judgment of the District Court) the issues decided by the Eleventh Circuit. It would be highly unlikely that a full adjudication on the merits would alter in any way the Eleventh Circuit's ruling with respect to those issues.

Moreover, even if the opinion below were interlocutory, this Court might well decide to review the matter should it find that "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari. . . ."[1]

2. Respondents argue at Br. in Opp. 13 & 14 that the alleged bad faith cause of action, if not property of the estate under 11 U.S.C. § 541(a)(1), would be property of the estate under 11 U.S.C. § 541(a)(7). Respondents cite no authority for their position that a cause of action clearly not available to a Chapter 7 debtor on the date of the bankruptcy filing can ripen into a post bankruptcy cause of action for the benefit of a Chapter 7 bankruptcy estate.

Respondents' reliance on section 541(a)(7) is misplaced. That section simply adds to the bankruptcy estate assets which are acquired by the estate after the petition date. Section 541(a)(7) is not intended to expand a debtor's rights to a pre-bankruptcy cause of action beyond what such rights were on the petition date. As explained by the leading treatise on bankruptcy law:

> An example of the application of section 541(a)(7) would be if the trustee entered into a contract after

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[1] R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 225 (6th ed. 1986) [referencing *Estelle v. Gamble*, 429 U.S. 97, 115 (1976)].

> commencement of the case. The estate's interest in such a contract would, pursuant to section 541(a)(7), be property of the estate. (Citations omitted.)[2] (Emphasis supplied.)

Respondents correctly cite *In re Wilson*, 694 F.2d 236, 238 (11th Cir. 1982) for the proposition that section 541(a)(7) brings into the bankruptcy estate every interest not covered by a statutory provision mandating some other treatment. Br. in Opp. 14. However, the issue of whether the bad faith cause of action is property of the estate is covered by section 541(a)(1). That provision, as discussed in Petitioner's Petition[3], excludes from the bankruptcy estate claims acquired by the debtor against others unless such claims were in existence at the commencement of the case.[4] The legislative history of section 541(a)(1)[5] is clear that Congress' intention was not to expand such rights.

Under the plain holding of *Wilson*, section 541(a)(7) is inapplicable to the facts of the case at bar because, as stated in *Wilson*, there is another subsection of 11 U.S.C. § 541, i.e., section 541(a)(1), which mandates "some other treatment." Accordingly, only those rights available to Dr. Kimbell as of the date he filed bankruptcy passed to his bankruptcy estate.[6]

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[2] 4 *Collier On Bankruptcy* ¶541-20, at p. 541-105, 106 (15 ed. 1993).

[3] Pet. 9, 10.

[4] See *In re Doemling*, 116 B.R. 48 (Bkrtcy. W.D. Pa. 1990) wherein the Bankruptcy Court held that a cause of action which accrued five months after the filing date did not become property of the estate under section 541(a)(7) as it was excluded under section 541(a)(1).

[5] "Though this paragraph will include choses in action and claims by the debtor against others, it is not intended to expand the debtor's rights against others more than they exist at the commencement of the case...." H.R. Rep. No. 595, 95th Cong., 1st Sess. 376-77 (1977). S. Rep. No. 989, 95th Cong., 2d Sess. 91 (1978).

[6] *See* Pet. 8-10 and specifically n. 20 wherein the decision of *Miller v. Shallowford Community Hosp., Inc.*, 767 F.2d 1556 (11th Cir. 1985) is discussed.

Respondents clearly miss the mark by arguing that a cause of action not available to the estate under section 541(a)(1) can later become property of a Chapter 7 estate under section 541(a)(7). This result contradicts the plain meaning of section 541(a)(1), that section's legislative history and an uninterrupted line of interpretive case law.[7]

3. Respondents argue at Br. in Opp. 14, 15 & 16 that Petitioner is engaging in a "legal flip-flop" by impermissibly changing its legal position on appeal. In support of this argument, Respondents cite five quotations from Petitioner's summary judgment memorandum ("Petitioner's Memorandum").[8] Respondents have misinterpreted their meaning.

The first four quotations cited by Respondents[9] were taken from Section III A of Petitioner's Memorandum. This section of Petitioner's Memorandum addressed the issue of whether Mrs. Camp, a co-Plaintiff, had standing to prosecute a bad faith action against Petitioner. When viewed in the context in which these quotes were written, it is simply unmistakable that they carry a different meaning than that now suggested by Respondents. For instance, a plain reading of the text accompanying the first quotation shows unequivocally that Petitioner was discussing the general operation and applicability of Section 541 of the Bankruptcy Code once a bankruptcy petition has been filed. This text reads:

> Although there is Florida case law for the proposition that a malpractice victim has standing

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[7] A correct application of section 541(a)(7) would, for example, bring into the bankruptcy estate a cause of action arising from an insurance policy purchased by the bankruptcy trustee for the bankruptcy estate. See n.1, *supra*. Similarly, if the bankruptcy estate earned interest on property of the estate after the commencement of the case, such interest would become property of the estate under section 541(a)(7). See *In re Carlson*, 55 B.R. 124, 125 (Bkrtcy. W.D. Mo. 1985).

[8] R. II:106.

[9] R. II:106 6, 6, 7 and 8 n. 22.

> as a third party beneficiary to bring an excess judgment action against an insurance carrier, that case law does not involve the bankruptcy of the insured and the applicability of Section 541 of the Bankruptcy Code. That section vests the Bankruptcy Estate with title to all legal and equitable interests of the debtor. Thus, Dr. Kimbell's Bankruptcy Estate is vested with whatever claim Dr. Kimbell has against St. Paul arising out of his St. Paul insurance policy.

R. II:106 at 6.

At no time did Petitioner ever argue, or even tacitly acknowledge, that Dr. Kimbell or his bankruptcy estate possessed a bad faith action against Petitioner. Rather, Petitioner's point was that once a debtor files a petition under Chapter 7 of the Bankruptcy Code, his bankruptcy estate acquires any cause of action which he possessed at the time. The remaining quotations are similarly taken out of context.

The distortion of Petitioner's position is also readily apparent from the manner in which Respondents present the last of the aforementioned five quotations. This quotation, found at R. II:106 at 11, does not indicate the fact that it omits language at the end of the quoted sentence. The entire text of the quoted sentence reads:

> While theoretically the Bankruptcy Estate became the owner of Dr. Kimbell's insurance policy at the time of the filing of his Bankruptcy Petition, the Courts have had no difficulty in distinguishing (1) those cases where the estate had a claim or interest in an insurance policy which the Trustee <u>should</u> assert and <u>recover</u> for the benefit of a certain class of creditors from (2) those cases where the estate

clearly does not have such a claim or interest and should not assert a claim.[10]

It is of importance to note that the subsection from which the fifth quotation was taken is entitled "St. Paul owed no duty to Venn." R. II:106 at 10. This section sets forth one of Petitioner's arguments as to why Venn could not prosecute the alleged bad faith action against Petitioner. Notably, Respondents chose not to quote the conclusion of Petitioner's argument appearing at the end of this section. This omitted language reads:

> "It necessarily follows that St. Paul owed no duty to Venn or to the Bankruptcy Estate and that therefore its failure to settle Camps' lawsuit is not actionable by Venn."

R. II:106 at 14.

The foregoing demonstrates that Respondents' argument is specious. Petitioner's position is, and has always been, that no bad faith cause of action belongs to Dr. Kimbell's bankruptcy estate.

[10] It is noteworthy that Petitioner has never denied that the subject insurance policy became property of the bankruptcy estate. This proposition is settled bankruptcy law. However, it is one matter to say that the *policy* became property of the estate and quite another matter to say that a cause of action arising thereunder but *after* bankruptcy is likewise property of the estate.

* * * * *

For the foregoing reasons and those stated in Petitioner's Petition, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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